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SUPREME COURT, U.S.

No. 07-917

IN THE

SUPREME COURT OF THE UNITED STATES

PAMELA CARVEL, as Executor of the Estate of Agnes Carvel,

Petitioner,

v.

CARVEL FOUNDATION INC., a Company incorporated under the laws of the State of Florida,

Respondent.

THOMAS AND AGNES CARVEL FOUNDATION, Ancillary Administrator LEONARD M. ROSS,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE THOMAS AND AGNES CARVEL FOUNDATION'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned attorneys of record hereby certify that Respondent The Thomas and Agnes Carvel Foundation is a membership corporation organized pursuant to New York's Not-For-Profit Corporation Law. The Foundation has no parent corporation and no publicly held corporation is a Member of the Foundation.

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INTRODUCTION

Respondent The Thomas and Agnes Carvel Foundation (the "Foundation") respectfully submits this Brief in opposition to the Petition for Writ of Certiorari (the "Petition") submitted by Petitioner Pamela Carvel ("Ms. Carvel") in which Ms. Carvel seeks review of a Summary Order of the United States Court of Appeals for the Second Circuit (the "Second Circuit") entered on August 1, 2007.

In her Petition, Ms. Carvel, purportedly proceeding as Executor of the Estate of Agnes Carvel ("Agnes's Estate"), seeks to enforce a multi-million dollar judgment that she obtained from a United Kingdom court. She omits to disclose to the Court, however, that she has been removed from her position as Executor, and that the judgment that she seeks to enforce has been set aside by the same United Kingdom court that issued it. For these fundamental reasons, Ms. Carvel lacks standing to proceed and there is no live case or controversy. Moreover, even if the Court were to turn to the merits of the Petition, the Petition does not present any issue that warrants granting certiorari. For all of these reasons, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Procedural History

On January 20, 2006, Ms. Carvel, in her capacity as Executor of Agnes's Estate, commenced a proceeding in the United States District Court for the Eastern District of New York (the "District Court," and the "District Court Proceeding," respectively) by filing with that court a Motion for Order Confirming

Foreign Judgment. (SA-8-12; App. 5).[1] By that motion, Ms. Carvel sought to enforce a judgment in an amount exceeding £8 million issued by the High Court of Justice, Chancery Division, London England (the "UK Judgment" and the "High Court," respectively). (Id.). In particular, Ms. Carvel requested the entry of an order directing payment from the New York assets of Agnes's Estate. (SA-12; SA-125-26).

Upon learning of the District Court Proceeding, the Foundation, pursuant to the District Court's Individual Practices, filed a letter with the District Court dated February 3, 2006 seeking a pre-motion conference in respect of its anticipated motions to intervene and dismiss. (SA-26-28). The New York ancillary administrator of Agnes's Estate, Leonard M. Ross, Esq. ("Mr. Ross"), filed a similar letter with the District Court on February 6, 2006. (SA-41-43).

Upon receiving the letters from counsel to the Foundation and Mr. Ross, the District Court issued an Order dated February 9, 2006 (the "February 9, 2006 Order") requiring Ms. Carvel to appear on March 9, 2006 and show cause why the Foundation and Mr. Ross should not be permitted to intervene and why the action should not be transferred to the Surrogate's Court of the State of New York for Westchester County (the "Surrogate's Court") for

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[1] In citations throughout this Brief, "App." refers to the Appendix annexed to Ms. Carvel's Petition. "SA" refers to the Supplemental Appendix for Intervenor The Thomas and Agnes Carvel Foundation submitted to the Second Circuit on or about November 29, 2006. "A." refers to the Appendix submitted by Ms. Carvel to the Second Circuit on or about October 30, 2006.

lack of subject matter jurisdiction. (A. 4). On or about March 6, 2006, Ms. Carvel filed a 70-page submission (including exhibits) opposing intervention and dismissal. (SA-54-123).

The District Court conducted a hearing on March 9, 2006 pursuant to the February 9, 2006 Order. (SA-124-142). At the hearing, the Court heard oral argument of Ms. Carvel as well as counsel to the Foundation and Mr. Ross. (Id.).

On March 29, 2006, the District Court issued a Memorandum and Order granting the Foundation and Mr. Ross leave to intervene and dismissing the District Court Proceeding for lack of subject matter jurisdiction. (App. 5-12). The District Court based the dismissal on the "probate exception" to diversity jurisdiction, concluding that an exercise of jurisdiction would "inevitably and impermissibly interfere with the Surrogate Court's 'probate proceedings,' and custody and control over Agnes' New York Estate." (App. 11-12). Judgment was entered on March 30, 2006. (A. 12).

The Second Circuit affirmed by Summary Order on August 1, 2007. The Second Circuit "agree[d] with the District Court that, pursuant to the probate exception, it lacked subject matter jurisdiction to hear plaintiff's action." (App. 3). In arriving at this conclusion, the Second Circuit applied this Court's recent ruling in Marshall v. Marshall, 547 U.S. 293, 126 S. Ct. 1735 (2006). The Second circuit reasoned:

> Marshall explained that "the probate exception reserves to state probate courts the probate or annulment of a

> will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." [Marshall, 126 S. Ct. at 1748]; see also Lefkowitz v. Bank of N.Y. ___ F.3d ____, 2007 WL 1839756, at *12-*13 (2d Cir. June 28, 2007) (describing history of probate exception and scope of probate exception after Marshall). Here, plaintiff's action would interfere with a complex pending proceeding in New York Surrogate's Court concerning the assets and property of the Estate. Because plaintiff's action "endeavors to dispose of property that is in the custody of a state probate court," Marshall, 126 S. Ct. at 1748, the probate exception bars her from maintaining this action in federal court.

(App. 3-4).

B. The Foundation

The Foundation is a New York not-for-profit corporation. (SA-132.) As confirmed by a Decision After Trial entered by the Surrogate's Court on April 15, 2002 (the "April 15, 2002 Decision"), the Foundation is entitled to the residue of Agnes's Estate, subject to the payment of reasonable debts

and administration expenses.[2] (SA-145-154; App. 8). The Surrogate's April 15, 2002 Decision and the resulting Decree were affirmed on appeal by the Appellate Division, Second Department of the New York State Supreme Court on December 29, 2003. (SA-155-56).

C. Proceedings in the Surrogate's Court

Carvel-related proceedings have been pending in the Surrogate's Court since shortly after Thomas Carvel's death in October 1990. (App. 8). These have included numerous proceedings in the Estate of Thomas Carvel ("Thomas's Estate") to which both the Foundation and Ms. Carvel have been parties. (Id.).

Agnes Carvel, Thomas's wife, died in London, England in August 1998. (App. 8; SA-37). Ms. Carvel probated Agnes's will in the High Court, and the High Court appointed her personal representative of Agnes's Estate. (SA-37; SA-55). Mr. Ross subsequently was appointed New York ancillary administrator of Agnes's Estate. (SA-45-47). In that capacity, Mr. Ross marshaled New York assets of Agnes's Estate worth several millions of dollars. (SA-162). Under the terms of the Surrogate's April 15, 2002 Decision and the corresponding Decree, Mr. Ross is prohibited from distributing the assets that he has marshaled

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[2] Although the Surrogate, in his April 15, 2002 Decision, held that the Foundation was entitled to the assets at issue in that proceeding (including all income due from Thomas Carvel's Estate to Agnes's Estate) subject to the payment of reasonable debts and administration expenses (SA-152-153), the Surrogate has more recently indicated that there are fact issues that must be resolved to determine the proper disposition of the "income component" of Agnes's Estate. (SA-167).

pending further order of the Surrogate's Court. (SA-154).

On June 6, 2005, Mr. Ross commenced a proceeding in the Surrogate's Court seeking judicial approval of his final accounting as New York ancillary administrator of Agnes's Estate (the "Ross Accounting Proceeding"). (SA-164-168). Mr. Ross cited both Ms. Carvel and the Foundation as parties interested in the Ross Accounting Proceeding, and both Ms. Carvel and the Foundation objected to Mr. Ross's accounting. (SA-164). A trial of the issues presented in the Ross Accounting Proceeding commenced in May 2007. However, after the removal of Ms. Carvel as Executor of Agnes's Estate, discussed below, the trial was adjourned sine die. It has not resumed, and no date is scheduled for the trial to resume.

Among the issues to be tried in the Ross Accounting Proceeding is the ultimate disposition of the assets in the ancillary estate. (SA-167).

D. The UK Proceeding

In June 2003, Ms. Carvel commenced an action in the High Court, captioned Pamela Carvel v. Pamela Carvel (as Executor of the Estate of Agnes Carvel), in which she sought repayment of certain purported debts that Agnes owed her and claimed expenses of administering Agnes's Estate. (SA-86 ¶ 11). This proceeding was brought without notice to the Foundation, or any other interested party except

for an entity that Ms. Carvel controlled.[3] (App. 9). On May 6, 2004, Ms. Carvel obtained a judgment from the High Court ordering the Estate to pay her £8,085,095.51 and costs (the "UK Judgment"). (App. 5; SA-1).

On April 14, 2005, Ms. Carvel applied to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "Broward County Court") for an order domesticating the UK Judgment. (SA-38). She again did so without notice to the Foundation or any other interested party. The Broward County Court entered an order domesticating the UK Judgment (the "Florida Domestication Order") on May 10, 2005. (Id.). Ms. Carvel then sought to execute the judgment against several million dollars held by Mr. Ross, as New York ancillary administrator, by commencing an action in the Supreme Court of the State of New York for Nassau County (the "Nassau County Supreme Court"). She brought this proceeding, too, without notice to any interested party. (SA-160). The assets against which Ms. Carvel sought to enforce the judgment were a substantial portion of the same assets marshaled by Mr. Ross that are the subject of the Ross Accounting Proceeding.

Mr. Ross, upon learning of the judgment and Ms. Carvel's effort to enforce it against assets that he had marshaled, sought and obtained temporary restraining orders from both the Nassau County

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[3] Carvel Foundation, Inc., a Florida corporation of which Ms. Carvel was a director, was substituted as the defendant on July 24, 2003 after the High Court refused to permit Ms. Carvel to proceed by essentially suing herself. (SA-5-6).

Supreme Court and the Surrogate's Court that prohibited Ms. Carvel from, *inter alia*, "taking any action to enforce the [UK Judgment] obtained by Pamela Carvel with regard to assets and property of the Estate." (App. 10-11).

On Mr. Ross's motion, the Surrogate's Court subsequently converted its temporary restraining order into a preliminary injunction, holding that "[t]he ancillary estate and its creditors will be irreparably harmed if Pamela is allowed to execute on all of the assets which comprise the estate." (SA-161-62). The Surrogate's Court further explained:

> [I]t is this court which has jurisdiction over the assets in the ancillary estate, and it is this court that needs to be satisfied as to the validity and the enforceability of the UK judgment inasmuch as the judgment exceeds the assets of the ancillary estate which approximate $13 million.

(SA-162; see also id. at 166 (stating that the Surrogate's Court has "exclusive jurisdiction over the assets of the ancillary estate and has the responsibility to insure that the estate is settled and distributed.")).

On January 10, 2006, on the Foundation's motion, the Broward County Court stayed the Florida Domestication Order. The Broward County Court then vacated the Florida Domestication Order by an order entered on January 31, 2006 (the "January 31 2006 Order"), finding "strong evidence of fraud." (App. 9; SA-36-40). The January 31, 2006 Order was affirmed on appeal by the District Court

of Appeal of the State of Florida, Fourth District, on October 11, 2006. (SA-157).

Despite the two temporary restraining orders prohibiting her from doing so, on January 20, 2006, Ms. Carvel commenced the District Court Proceeding by filing her Motion for Order Confirming Foreign Judgment against the Estate of Agnes Carvel in the District Court. (SA-8-12). Ms. Carvel captioned the District Court Proceeding "Pamela Carvel (as Executor of the Estate of Agnes Carvel) v. Carvel Foundation, Inc. (A Company incorporated under the laws of the State of Florida)." (App. 5, 2; SA-8). She did not name as parties, or give formal notice to, either the Foundation or Mr. Ross. (App. 10).

E. Misstatements of Fact Pursuant to Supreme Court Rule 15.2.

The misstatements of fact in Ms. Carvel's Petition are legion, and the Foundation will not address each of them in this Brief. However, it will address two particularly noteworthy omissions that relate directly to the question whether certiorari should be granted. First, Ms. Carvel omits to disclose that she is no longer Executor of the Estate of Agnes Carvel, the capacity in which she purports to bring her Petition. The High Court removed her from that position, on the Foundation's application, in June 2007. See Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81 at 96. Second, Ms. Carvel also omits to disclose that the High Court set aside the UK Judgment that is the subject of the Petition. Id. Ms. Carvel sought to appeal these rulings, but the UK Courts have denied her such leave, and she has now exhausted all

avenues to seek an appeal to a United Kingdom court.

SUMMARY OF THE ARGUMENT

Ms. Carvel is no longer Executor of Agnes's Estate, the capacity in which she seeks certiorari, and the UK Judgment that is the subject of the District Court Proceeding has been set aside. Accordingly, Ms. Carvel does not have standing to bring this appeal and there is no live case or controversy.

Moreover, even if the Court were to reach the merits, Ms. Carvel has established no compelling reason for the Court to grant her Petition. The Second Circuit properly affirmed the District Court's dismissal of the District Court Proceeding for lack of subject matter jurisdiction. In so doing, the Second Circuit correctly applied this Court's holding in Marshall to the facts of this case. Even if this Court had a question whether the Second Circuit's application of Marshall was correct – and there is no reason to have such a question – this would not justify granting certiorari. Ms. Carvel does not point to an important question of federal law that requires resolution by this Court or any other compelling basis for review by this Court. Nor does the dismissal of the District Court Proceeding consistent with this Court's well-established precedents present any constitutional issue that merits review.

For all of these reasons, the Court should deny the Petition.

ARGUMENT

I. Ms. Carvel Lacks Standing

By order of the High Court, Ms. Carvel has been removed as Executor of the Estate of Agnes Carvel – the capacity in which she brought the lower court proceedings and her Petition. Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81. Accordingly, she no longer has standing to pursue the Petition. See, e.g., Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 592, 87 S. Ct. 675, 678 (1967) (finding resigned teacher no longer had standing to pursue claims in his capacity as a teacher); Karcher v. May, 484 U.S. 72, 108 S.Ct. 388 (1987) (finding that members of the legislature entering into a suit in their official capacity did not have standing to appeal the judgment after they no longer held office; rather, the authority to pursue the lawsuit belonged to their successors); Kovitz v. Cohen, 1996 U.S. App. LEXIS 26308 (2d Cir. 1996), at *3-*4 ("[New York's] Estates Powers and Trusts Law provides that any action for or against the property of a decedent must be by or against the executor or administrator in his or her representative capacity.... [Appellant] lacks standing to pursue this appeal. [Appellant] is not the estate administrator, and he has pursued this appeal and the motion underlying it in his individual capacity.").

The Petition should be denied for this reason alone.

II. There Is No Live Case Or Controversy

Even if the Court were to find that Ms. Carvel did have standing to bring the Petition, the Petition would nonetheless properly be denied because a

favorable judgment would not give Ms. Carvel any relief. In the same decision that removed Ms. Carvel as Executrix of Agnes's Estate, the High Court set aside the UK Judgment that is the subject of the Petition. Thomas and Agnes Carvel Foundation v. Carvel [2007] 4 All ER 81. Accordingly, there is no longer any foreign judgment to enforce, no relief to be granted, and thus, no case or controversy. See Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984) ("[R]elief from the injury must be 'likely' to follow from a favorable decision.") (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 at 38, 96, S. Ct. 1917, 1924 (1975)); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019 (1998) (stating that relief must "remedy the injury suffered"); British Int'l Ins. Co. v. Seguros la Republica S.A., 354 F.3d 120, 122-23 (2d Cir. 2003) ("The mootness doctrine provides that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (internal quotations and citations omitted).

Here, even if this Court were to reverse the Second Circuit and determine that the District Court did have subject matter jurisdiction to hear the dispute, there no longer would be any dispute to resolve. The foreign money judgment that is the subject of the District Court Proceeding has been vacated, and thus can no longer be "confirmed." Accordingly, there is no live case or controversy.

For this reason too, the Petition should be denied.

III. There Is No Compelling Reason To Grant Certiorari

Because Ms. Carvel lacks standing and there is no live case or controversy, this Court need not reach the merits of the Petition. However, even if the Court were to consider the merits, the Petition does not present any valid basis to grant certiorari.

In determining whether to grant certiorari, the Court considers whether a "United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).[4] Neither of these situations is present here because the lower courts simply applied the probate exception to diversity jurisdiction consistent with prior Supreme Court precedent.

The lower courts decided the case consistent with this Court's recent decision in Marshall and prior precedent. As this Court recognized in Marshall, the probate exception is a particular application of the more general principle that a federal court may not exercise diversity jurisdiction where doing so would interfere with a state court's administration of assets over which the state court already has exercised jurisdiction. Marshall, 547 U.S. at 312, 126 S. Ct. at 1748. The District Court, applying prior Supreme Court precedent, recognized

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[4] Supreme Court Rules 10(a) (regarding Circuit splits) and 10(b) (regarding conflict among the highest court of a state and either the highest court of another state or of a Circuit Court) clearly do not apply and will not be discussed.

this principle, stating that federal courts "'may not exercise jurisdiction to adjudicate rights in such property where the final judgment' will 'interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.'" (citing Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 298 (1946)) (App. 7). Although Marshall had not yet been decided at the time of the District Court's Memorandum and Order, the Second Circuit explicitly affirmed the District Court on the rationale of Marshall. (App. 3-4).

The lower courts' rulings are correct because enforcing the UK Judgment necessarily would have interfered with the Surrogate's ongoing administration of estate assets. As the District Court observed, the Surrogate's Court has presided over "extensive, contentious litigation" concerning Carvel family assets since shortly after Thomas Carvel's death in October 1990. (App. 8). This includes the Ross Accounting Proceeding in which the Surrogate's Court has already exercised jurisdiction over the very assets against which Ms. Carvel seeks to execute the UK Judgment. Because the Surrogate's Court "has exclusive jurisdiction over the assets of the ancillary estate and has the responsibility to insure that the estate is settled and distributed," the lower courts rightly determined that the probate exception applies, and the District Court thus lacked subject matter jurisdiction. (SA-166).

Even if the Second Circuit had misapplied Marshall (which, of course, the Foundation does not believe that it did), mere error is not a compelling reason for the Court to grant certiorari. See Sup. Ct.

R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Ms. Carvel attempts to confuse the issue by asserting that the probate exception applies differently to foreign executors. (See, e.g., Petition at 10). She fails, however, to provide any logical or legal basis for this contention. The operative consideration in determining whether the probate exception applies is whether a state court has already assumed control of a *res* and whether the federal court's exercise of diversity jurisdiction would interfere with the state court's administration of that *res*. See, e.g., Marshall, 547 U.S. at 312; 126 S. Ct. at 1748. Whether Ms. Carvel brought the District Court Proceeding as an executor of an Estate domiciled within the State of New York or a foreign country is immaterial to this consideration. The District Court did not decline to exercise jurisdiction on the ground that Ms. Carvel was bringing the proceeding in her capacity as a foreign executor; rather, it declined jurisdiction because the Surrogate already had exercised jurisdiction over Agnes's Estate, and the District Court Proceeding would have interfered with the Surrogate's administration of that estate. (App. 8). The Second Circuit held likewise in affirming the District Court. (App. 4). None of this presents a novel or important issue that merits this Court's review.

IV. The Dismissal Of The District Court Proceeding For Lack Of Subject Matter Jurisdiction Does Not Raise Any Constitutional Issues

Ms. Carvel purports to raise a number of constitutional objections in her Petition. They are all misplaced.

Every court is required to determine whether it has subject matter jurisdiction over a case in order to hear it. See Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"); Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42, 43 (1908); Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 107-10 (2d Cir. 1997). Here, the District Court correctly determined that the probate exception applied, and that it was therefore without jurisdiction to hear the controversy.

There can be no constitutional issue associated with the dismissal of the District Court Proceeding for lack of subject matter jurisdiction consistent with this Court's well-established precedents. See, e.g., Marshall, 547 U.S. at 311; 126 S. Ct. 1735 at 1748 ("[W]hen one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*."); Markham v. Allen, 326 U.S. 490, 494, 66 S. Ct. 296, 298 (1945) (stating that federal courts may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."); Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, 59 S. Ct. 275, 280 (1939) (holding that federal court jurisdiction

must yield to a prior exercise of state court jurisdiction over a *res* when the property has actually been seized under judicial process and when suits "are brought to marshal assets, administer trusts, or liquidate estates . . . where to give effect to its jurisdiction, the court must control the property."); Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189, 195, 55 S. Ct. 386, 389 (1935) ("[I]f the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other."); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44, 30 S. Ct. 10, 12 (1909) ("The courts of the United Sates, while they may exercise the jurisdiction, and may make decrees binding upon the parties, cannot seize and control the property which is in the possession of the state court.").

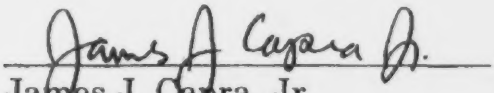
When the District Court determined that the probate exception applied, it was bound to dismiss the case, which it did. The Second Circuit correctly affirmed. Ms. Carvel does not, and cannot, point to any legitimate constitutional questions raised by that dismissal.

In short, Ms. Carvel has failed to identify any compelling reason for the Court to grant certiorari. There is none, and the Court should deny the Petition accordingly.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondent the Thomas and Agnes Carvel Foundation respectfully requests that the Petition be denied.

Respectfully submitted,



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